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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 BENNIE DIXON,

11 Plaintiff,

12 v.

13 CITY OF SAN DIEGO, *et al.*,

14 Defendants.
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Civil No. 06CV2027 JAH (CAB)

ORDER ADOPTING THE
MAGISTRATE JUDGE'S
SECOND REPORT AND
RECOMMENDATION
[DOC. # 68]; GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AS TO
THE FEDERAL CLAIMS [DOC.
59]; AND DISMISSING THE
REMAINING STATE LAW CLAIMS

17 **INTRODUCTION**

18 Currently before the Court is a motion for summary judgment filed by defendants
19 Mark Taylor ("Taylor"), Patrick Sullivan ("Sullivan"), and Brandie Sorbie ("Sorbie")
20 (collectively "defendants"),¹ seeking judgment in defendants' favor based on qualified
21 immunity grounds on the claims presented by plaintiff Bennie Dixon ("plaintiff") in his
22 first amended complaint filed pursuant to 42 U.S.C. § 1983. After the motion was fully
23 briefed, the Honorable Leo S. Papas, United States Magistrate Judge, issued a Report and
24 Recommendation ("report") recommending that this Court grant the motion in its entirety
25 and dismiss both the federal and state law claims against defendants.² Plaintiff filed
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27 ¹ Defendants are the sole remaining defendants in this case. *See* Doc. # 46, 54.

28 ² The magistrate judge actually issued two reports, each recommending the motion be granted. *See* Docs. # 62, 68. However, based on the late filing of an opposition to the motion by plaintiff, this Court declined to adopt the first report and remanded the motion back to the magistrate judge so that the motion

1 objections to the magistrate judge's report. After a careful consideration of the pleadings
 2 and relevant exhibits submitted by the parties, and for the reasons set forth below, this
 3 Court **OVERRULES** petitioner's objections, **ADOPTS** the magistrate judge's report,
 4 **GRANTS** defendants' motion for summary judgment in its entirety and **DISMISSES** all
 5 claims against defendants presented in the first amended complaint.

6 BACKGROUND³

7 This case stems from an incident that occurred between plaintiff and defendants on
 8 March 9, 2005, after defendants, all law enforcement officers, had responded to a radio
 9 call concerning a battery upon a custodian at a school. Plaintiff, fitting the description of
 10 the suspect in the battery, was approached by San Diego Police Officer Michelle Johnson,⁴
 11 who attempted to place plaintiff under arrest. A struggle then ensued between Johnson
 12 and plaintiff when plaintiff reached for a walking stick that was lying next to him.
 13 Johnson used her expandable baton upon plaintiff's arms after plaintiff stood up quickly,
 14 clenched his fists and swung them at her. Sorbie had arrived on the scene just before the
 15 struggle ensued and joined in the effort to subdue plaintiff who continued to swing his
 16 arms at Johnson. Taylor and Sullivan arrived shortly thereafter and the four officers were
 17 able to handcuff plaintiff after striking several blows of their batons upon plaintiff's thighs.

18 Plaintiff was identified by a school employee as the perpetrator of the battery on
 19 the custodian. After plaintiff began making statements about snakes around his ankles,
 20 he was transported to County Mental Health for evaluation where it was learned that
 21 plaintiff had recently been released from a 24 or 26 day incarceration at the County Jail.

22 Plaintiff's first amended complaint, the operative pleading here, was filed on
 23 _____

24 could be decided on the fully briefed record. *See* Doc. # 65. Therefore, this Court addresses only the
 25 magistrate judge's second report.

26 ³ The magistrate judge presented a detailed account of the factual and procedural history in this case
 27 in the report. *See* Doc. # 68 at 2-5. Plaintiff does not object to the facts as outlined by the magistrate judge
 in the report. *See* Doc. # 70. This Court, therefore, deems it sufficient to present only a summary of the
 salient facts here.

28 ⁴ Defendant Johnson is no longer a police officer and was not served with the lawsuit. This Court
 dismissed the claims against defendant Johnson on August 15, 2008. *See* Doc. # 54.

1 December 13, 2006. Defendants filed their answer to the complaint on July 2, 2008.
 2 Defendants filed their motion for summary judgment on December 8, 2008. Plaintiff filed
 3 his opposition on January 16, 2009.⁵ The magistrate judge issued the second report⁶ on
 4 February 17, 2009. Plaintiff filed his objections to the magistrate judge's second report
 5 on April 1, 2009.

6 DISCUSSION

7 **1. Legal Standard**

8 The district court's role in reviewing a magistrate judge's report and recommendation
 9 is set forth in 28 U.S.C. § 636(b)(1). Under this statute, the court "shall make a *de novo*
 10 determination of those portions of the report...to which objection is made," and "may
 11 accept, reject, or modify, in whole or in part, the findings or recommendations made by the
 12 magistrate [judge]." *Id.* The party objecting to the magistrate judge's findings and
 13 recommendation bears the responsibility of specifically setting forth which of the magistrate
 14 judge's findings the party contests. *See* Fed.R.Civ.P. 72(b). It is well-settled, under Rule
 15 72(b), that a district court may adopt those parts of a magistrate judge's report to which
 16 no specific objection is made, provided they are not clearly erroneous. *See Thomas v. Arn*,
 17 474 U.S. 140, 153-55 (1985).

18 **2. Analysis**

19 In his first amended complaint filed pursuant to 42 U.S.C. § 1983, plaintiff alleges
 20 that defendants violated his rights under the United States Constitution based on claims
 21 for unlawful search and seizure and excessive force. Plaintiff also alleges state law claims
 22 for battery, false arrest, negligence, emotional distress, and violation California Civil Code
 23 § 52.1. Defendants contend that qualified immunity bars plaintiff's suit.

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 25 ⁵ This document was entitled "Motion for Denied Access to Courts." *See* Doc. # 64. This Court,
 26 after a careful review of this pleading, denied plaintiff's motion for denied access to courts and found that
 27 the document also contained argument and evidence in opposition to the motion for summary judgment
 which should be considered by the magistrate judge. Doc. # 65. Plaintiff was also given the opportunity
 to supplement this opposition but failed to do so. *See id.*

28 ⁶ The magistrate judge's first report was issued on January 16, 2009. This Court, however, declined
 to adopt the report due to plaintiff's late filing of an opposition that had not been considered by the
 magistrate judge and remanded the motion on February 2, 2009. *See* Doc. # 65.

1 Section 1983 “creates a private right of action against individuals who, acting under
2 color of state law, violate federal constitutional or statutory rights.” Devereaux v. Abbey,
3 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). “Qualified immunity, however, shields
4 § 1983 defendants ‘[f]rom liability for civil damages insofar as their conduct does not
5 violate clearly established statutory or constitutional rights of which a reasonable person
6 would have known.’” Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)
7 (alteration in original)).

8 Fourth Amendment protections against unreasonable search and seizure are triggered
9 when an arrest occurs without probable cause or other justification. Dubner v. City &
10 County of San Francisco, 266 F.3d 959, 964 (9th Cir. 2001). A showing of probable cause
11 is a defense to a false arrest claim. Arpin v. Santa Clara Valley Trans. Agy., 261 F.3d 912,
12 920 (9th Cir. 2001). In order to state a claim for excessive force, plaintiff must establish
13 that defendants, acting under color of state law, violated his Fourth Amendment rights by
14 using unreasonably excessive force during arrest. Graham v. Connor, 490 U.S. 386, 396
15 (1989). However, plaintiff’s Fourth Amendment rights are not violated if the use of force
16 is “objectively reasonable,” that is, if the force used was necessary “in light of the facts and
17 circumstances confronting the officers,” without regard to their intent or motivation. Id.
18 at 397.

19 Under Saucier v. Katz, 533 U.S. 194 (2001), the first step in the qualified immunity
20 analysis is “to consider the materials submitted on support of, and in opposition to,
21 summary judgment, in order to decide whether a constitutional right would be violated if
22 all facts are viewed in favor of the party opposing summary judgment.” Jeffers v. Gomez,
23 267 F.3d 895, 909 (9th Cir. 2001). “If no constitutional violation is shown, the inquiry
24 ends.” Cunningham v. City of Wenatchee, 345 F.3d 802, 810 (9th Cir. 2003). On the
25 other hand, if “the parties’ submissions” create a triable issue of whether a constitutional
26 violation occurred, the second question is “whether the right was clearly established.”
27 Saucier, 533 U.S. at 201. A constitutional right is clearly established when “it would be
28 clear to a reasonable [government actor] that his conduct was unlawful in the situation he

1 confronted.” Id. at 202.

2 The magistrate judge found that “the evidence possessed by [d]efendants at the time
3 of the arrest support a finding that [d]efendants had probable cause to arrest [p]laintiff,”
4 noting plaintiff fit the description of the suspect, was contacted a short distance from the
5 school, and carried a stick that fit the description of the weapon used in the attack. Doc.
6 # 68 at 11. Thus, the magistrate judge determined that defendants’ arrest of plaintiff was
7 objectively reasonable under the circumstances. Id. In addition, the magistrate judge
8 found the force used by defendants was factually and objectively reasonable after balancing
9 “the nature and quality of the intrusion of [plaintiff’s] Fourth Amendment interests
10 against the countervailing governmental interests at stake.” Id. (quoting Graham, 490
11 U.S. at 396). Therefore, the magistrate judge concluded that defendants’ actions in total
12 were objectively reasonable, entitling defendants to qualified immunity from suit under
13 Saucier. Id. at 13. The magistrate judge also determined that, once the federal claims are
14 dismissed based on qualified immunity, plaintiff’s ancillary state law claims should also be
15 dismissed. Id. at 14 (citing United Mineworkers v. Gibbs, 383 U.S. 715, 726 (1966)).

16 Plaintiff filed objections to the magistrate judge’s report. However, none of
17 plaintiff’s arguments are directed at any specific fact or conclusion made by the magistrate
18 judge in the report. *See* Doc. # 70 at 6-11. Instead, plaintiff presents a lengthy discussion
19 objecting to a state court judge’s denial of plaintiff’s motion for discovery of documents
20 during state court proceedings. *See id.* Even liberally construing plaintiff’s pleading, this
21 Court has discerned no objection contained in the document directed specifically toward
22 the magistrate judge’s findings and conclusions set forth in the second report. As such, this
23 Court may adopt the magistrate judge’s report *in toto*, provided the findings made are not
24 clearly erroneous. *See Thomas*, 474 U.S. at 153-55.

25 After a thorough *de novo* review of the record, this Court agrees with the magistrate
26 judge’s findings and conclusions in their entirety, in that the record clearly reflects that
27 defendants’ acts were supported by probable cause and were objectively reasonable under
28 the circumstances, entitled defendants to qualified immunity under Saucier. This Court

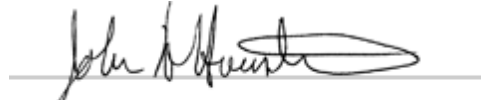
1 further agrees that the remaining state law claims should be dismissed under Gibbs. Thus,
2 this Court finds that the magistrate judge's findings and conclusions presented in the
3 second report are not clearly erroneous. Therefore, this Court overrules petitioner's general
4 objections, adopts the magistrate judge's report, grants defendants' motion for summary
5 judgment as to the federal claims and dismisses the remaining state law claims against these
6 defendants for lack of jurisdiction.

7 **CONCLUSION AND ORDER**

8 Based on the foregoing, **IT IS HEREBY ORDERED** that:

- 9 1. Petitioner's objections to the magistrate judge's second Report and
10 Recommendation are **OVERRULED** in their entirety;
11 2. The magistrate judge's findings and conclusions contained in the Report and
12 Recommendation [doc. # 68] are **ADOPTED** in full;
13 3. Defendants' motion for summary judgment based on qualified immunity on
14 plaintiff's federal claims [doc. # 59] is **GRANTED**;
15 4. Plaintiff's remaining state law claims are **DISMISSED**; and
16 5. The Clerk of Court shall enter judgment in favor of defendants accordingly.
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18 DATED: September 22, 2009

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20 JOHN A. HOUSTON
21 United States District Judge
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